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NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–21–40 OF 2004

B RAMLY ALI J

21 MARCH 2005

Companies and Corporations — Offences by companies — Offer to public to purchase 'interest' in company — Plaintiff offered for sale burial plots to public — No profit available for purchasers to

C *participate — Mere right of use of facilities, whether amounted to participation in assets of plaintiffs — Whether plaintiff business amounted to public offer for sale of 'interest' in company — Companies Act 1965 s 84*

Companies and Corporations — Purchase of business — Offer to public to purchase 'interest' in company — Plaintiff offered for sale burial plots to public — No profit available for purchasers to

D *participate — Mere right of use of facilities, whether amounted to participation in assets of plaintiffs — Whether plaintiff business amounted to public offer for sale of 'interest' in the company — Companies Act 1965 s 8*

Companies and Corporations — Purchase of business — Offer to public to purchase 'interest' in company — Whether sale and purchase agreement of burial plots owned by plaintiff company

E *amounted to investment contract — Companies Act 1965 s 84*

Words and Phrases — 'Common Enterprise' — Companies Act 1965 s 84

Words and Phrases — 'Interest'— Companies Act 1965 s 84

F *Words and Phrases — 'Profit' — Companies Act 1965 s 84*

The plaintiffs purchased lands to be developed as 'burial plots' and 'memorial park'. They then offered to the public the purchase of the burial plots and urn compartment and other infrastructure. Standard forms agreement were entered

G into with the purchasers ('the Standard Agreements'). The Standard Agreements allowed the purchaser to use the burial plots and urn compartments subject to the terms provided therein. Further, pursuant to the Standard Agreements the purchaser did not receive any profit, reward, interest, rent or monetary gain from the plaintiffs.

H The defendant claimed that the plaintiffs' business amounted to an 'interest' as defined in s 84 Companies Act 1965 ('the Act') and that the plaintiffs were required to comply with the relevant provisions under Part IV of Division 5 of the Act for making any offer of their business and services to the public, failing which the plaintiffs were committing an offence under s 91 of the same Act.

I The plaintiffs on the other hand contended that their said business was not an 'interest' as defined in s 84 of the Act, and therefore they were not required to comply with the provisions of Part IV Division 5 of the Act. In order to

ascertain the exact nature and scope of the plaintiffs' legal obligations under Part IV Division 5 of the Act vis-a-vis the operation of their business, the plaintiff filed an application to the court. In their application, the plaintiffs sought declarations of the court that: (i) their business was not within the meaning of 'interest' in s 84 of the Act; (ii) an approved deed under Part IV, Division 5 of the Act was not required for them to offer their business to the public; and (iii) by offering their services to the public without an approved deed, they did not contravene s 91 of the Act.

Held, granting the declarations:

(1) The plaintiffs' business was not an 'interest' within the meaning of limb (a) of s 84 of the Act as there was no profit available for the purchasers to participate. The mere right to use the facilities developed by the plaintiffs was not participation in the assets of the plaintiffs (see para 129).

(2) 'Profit' in the context of limb (a) must be read to mean economic benefit or pecuniary advantage or pecuniary gains, but does not include non-economic or non-pecuniary advantage (see para 40). Further, as the purchasers did not receive any profit, reward, interest, rent or monetary gain from the plaintiffs' business, they did not share the profit in the plaintiffs business. Hence, the interest of the purchasers was not 'a right to participate in the profit of the business undertaking or scheme' (see para 50).

(3) Applying the principles in *Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors* (1983) ACLC 1130 the burial plots could not constitute assets of the plaintiffs and hence there was no 'right to participate or interest in the assets' of the plaintiffs business (see para 69).

(4) Limb (b) of s 84 of the Act was not available because there was no common enterprise whereby the plaintiffs and purchasers were both involved to gain benefit. In this respect, the purchasers did not contemplate any profit as the Standard Agreements did no have a term to guarantee profit or rent. Further, there was no subsequent transaction to be performed by the purchasers besides the purchase of the right to use the urn compartments as well as the burial plots was stipulated in the Standard Agreements (see para 130). 'Common enterprise' must be something which both (or more) parties devise as a mean to gain 'profit, rent or interest'. There must also be continuing effort after the original transaction. Without such common objective to gain 'profit, rent or interest' as an ultimate objective and continuing transaction, there could not be 'common enterprise' within the meaning of limb (b) (see para 78).

(5) Limb (c) was also not applicable because the plaintiffs' business was not understood to be a time-sharing scheme. There were no 'two or more period' in which the purchasers could occupy the property of the plaintiffs. The purchasers might use the urns compartment and burial plots allotted to them perpetually (see paras 89 and 131).

(6) The Standard Agreements were not investment contract because they did not contemplate pecuniary return to the purchasers (see para 132). To constitute an investment contract, there must be element of 'profit' that the investor could enjoy, or at least in contemplation, when he entered into the transaction in question. In the instant case, there was no provision in the Standard Agreements to indicate that the purchasers would receive profit or rent or any form of return. The Standard Agreements merely gave raise to a right to use the urn compartments and 'occupy' the burial plots by way of interment. Hence, they could not be said to be 'investment contract' the meaning of limb (d) as they lack the essential element of contemplation of monetary return (see paras 101, 102 and 103).

(7) The purchasers, when exercising their rights to use the facilities, were exercising personal or individual right, as oppose to a 'right in common'. This was not within the definition of the words 'in common with other interest. The words 'employed in common with' were followed with 'any other interest in or right in respect of property acquired'. Therefore the 'common interest' in limb (d) must be that of the 'property acquired', not the person having an interest of the 'property acquired'. In other words, the words 'common interest' refer to the multiple interest that the purchasers acquired in the property, not the 'common interest' shared with other purchasers of the property. Hence, cll 5 and 8 of the Standard Agreements did not afford the meaning of 'common interest' within the definition of limb (d). Thus the plaintiffs' business could not be said to fall within the definition of interest under limb (d) of s 84 (see paras 108 and 109).

(8) The question of the plaintiffs having to comply with all the relevant requirements under Part IV Division 5 did not arise as these requirements could not be imposed on the plaintiffs since the plaintiffs business did not come within the definition of 'interest' under s 84 of the Act (see para 124).

[**Bahasa Malaysia summary**

Plaintif-plaintif membeli tanah dan kemudiannya memajukan tanah tersebut sebagai 'lot pengebumian' dan 'taman peringatan'. Mereka kemudiannya menawarkan kepada orang ramai lot pengebumian tersebut dan petak simpanan abu mayat dan lain-lain infrastruktur. Borang standard perjanjian digunakan untuk kontrak dengan pembeli-pembeli ('perjanjian standard'). Perjanjian standard membenarkan pembeli-pembeli menggunakan lot pengebumian dan petak simpanan sebagaimana terma-terma yang terkandung di dalamnya. Selanjutnya, mengikut perjanjian standard tersebut, pembeli tidak menerima sebarang keuntungan, ganjaran, faedah, sewa atau perolehan kewangan dari plaintif-plaintif.

Defendan menyatakan bahawa perniagaan plaintif-plaintif adalah satu 'kepentingan' sebagaimana yang ditafsirkan di bawah s 84 Akta Syarikat 1965 ('Akta tersebut') dan plaintif-plaintif dikehendaki mematuhi peruntukan yang relevan di bawah Bahagian IV Divisyen 5 Akta tersebut kerana membuat tawaran mengenai perniagaan dan perkhidmatan mereka kepada orang ramai, kegagalan berbuat demikian adalah merupakan satu kesalahan di bawah s 91 Akta tersebut.

Plaintif-plaintif sebaliknya mengatakan bahawa perniagaan mereka bukanlah satu 'kepentingan' sebagaimana yang ditafsirkan di bawah s 84 Akta tersebut, dan oleh yang demikian mereka tidak dikehendaki untuk mematuhi peruntukan-peruntukan Bahagian IV Divisyen 5 Akta tersebut. Untuk memastikan skop tanggungjawab undang-undang plaintif-plaintif di bawah Bahagian IV Divisyen 5 Akta tersebut berhubung dengan operasi perniagaan mereka, plaintif memfailkan satu permohonan ke mahkamah. Di dalam permohonan mereka, plaintif-plaintif memohon untuk deklarasi mahkamah bahawa: (i) perniagaan mereka tidak tertakluk di bawah maksud 'kepentingan' di bawah s 84 Akta tersebut; (ii) suratikatan yang diluluskan di bawah Bahagian IV, Divisyen 5 Akta tersebut tidak diperlukan bagi mereka menawarkan perniagaan mereka kepada orang ramai; dan (iii) dengan menawarkan perkhidmatan mereka kepada orang ramai tanpa suratikatan yang diluluskan, mereka tidak menyalahi s 91 Akta tersebut.

Diputuskan, membenarkan deklarasi-deklarasi yang dipohon:

(1) Perniagaan plaintif-plaintif bukanlah satu 'kepentingan' dalam ertikata bahagian (a) s 84 Akta tersebut kerana tiada keuntungan untuk disertai oleh pembeli-pembeli. Hak menggunakan kemudahan yang dimajukan oleh plaintif-plaintif semata bukanlah satu penyertaan dalam aset-aset plaintif (lihat perenggan 129).

(2) 'Keuntungan' dalam konteks bahagian (a) mestilah diertikan sebagai faedah ekonomi atau manfaat wang atau perolehan wang, tetapi ia tidak termasuk manfaat bukan ekonomi atau wang (lihat perenggan 40). Selanjutnya, oleh kerana pembeli-pembeli tidak menerima sebarang keuntungan, ganjaran, faedah, sewa atau perolehan kewangan dari perniagaan, mereka tidak berkongsi keuntungan di dalam perniagaan plaintif-plaintif. Maka, kepentingan pembeli-pembeli bukanlah 'satu hak untuk berserta di dalam keuntungan perniagaan atau skim' (lihat perenggan 50).

(3) Mengguna pakai prinsip-prinsip di dalam *Applewood Pty Ltd dan Brisbane Unit Development Corp Pty Ltd* lot pengebumian tersebut bukan termasuk dalam aset-aset plaintif-plaintif dan dari itu tiada 'hak untuk berserta atau kepentingan di dalam aset-aset' perniagaan plaintif-plaintif (lihat perenggan 69).

(4) Bahagian (b) s 84 Akta tersebut tidak terpakai kerana tiada usaha bersama di mana plaintif-plaintif dan pembeli-pembeli kedua-duanya terlibat dalam pencarian faedah. Sehubungan dengan ini, pembeli-pembeli tidak menjangkau sebarang keuntungan kerana Perjanjian standard tidak mempunyai terma yang menjamin keuntungan atau sewa. Selanjutnya, tidak terdapat urusniaga yang seterusnya untuk dilakukan oleh pembeli-pembeli selain dari pembelian hak untuk mengguna petak simpanan bersama lot pengebumian seperti yang diperuntukkan di dalam perjanjian standard (lihat perenggan 130). 'Usaha bersama' mestilah sesuatu yang dicipta oleh kedua (atau lebih) pihak-pihak untuk memperoleh 'keuntungan, sewa atau faedah'. Ianya juga mesti terdapat usaha yang berterusan selepas transaksi asal. Tanpa objektif bersama untuk memperoleh 'keuntungan, sewa atau faedah' sebagai objektif unggul dan transaksi yang berterusan, maka tidak boleh ada 'usaha bersama' dalam maksud bahagian (b) (lihat perenggan 78).

(5) Bahagian (c) juga tidak terpakai kerana perniagaan plaintif-plaintif bukanlah sesuatu yang dimaksudkan sebagai satu skim perkongsian masa. Tidak terdapat 'dua atau lebih jangkamasa' di mana pembeli-pembeli boleh menduduki hartanah plaintif-plaintif. Pembeli-pembeli boleh menggunakan petak simpanan dan lot pengebumian yang diuntukkan kepada mereka untuk selama-lamanya (lihat perenggan 89 dan 131).

(6) Perjanjian-perjanjian standard itu bukanlah kontrak pelaburan kerana mereka tidak menjangkau pulangan wang kepada pembeli-pembeli (lihat perenggan 132). Untuk menjadi satu kontrak pelaburan, ia mesti terdapat elemen 'keuntungan' yang boleh dikecepai oleh pelabur, atau sekurang-kurangnya dalam jangkauannya, semasa dia memasuki transaksi berkenaan. Di dalam kes semasa, tiada peruntukkan di dalam perjanjian standard yang menunjukkan pembeli-pembeli akan menerima keuntungan atau sewa atau sebarang bentuk pulangan. Perjanjian-perjanjian standard tersebut hanya memberikan hak untuk mengguna petak simpanan dan 'menghuni' lot pengebumian secara intermen. Maka, ia tidak boleh dikatakan sebagai 'kontrak pelaburan' dalam maksud bahagian (d) kerana ia kekurangan elemen mustahak iaitu pulangan kewangan (lihat perenggan 101, 102, 103).

(7) Pembeli-pembeli, apabila mengguna pakai hak-hak mereka untuk menggunakan kemudahan-kemudahan tersebut, mengguna pakaikan hak-hak persendirian atau individu mereka, dan bukannya 'hak bersama'. Ini bukan tertakluk di bawah tafsiran perkataan-perkataan 'bersama dengan kepentingan lain'. Perkataan-perkataan 'digunakan bersama' yang diikuti oleh 'kepentingan yang lain atau hak di dalam harta yang diperoleh'. Oleh yang demikian 'kepentingan bersama' di dalam bahagian (d) mestilah pada 'harta yang diperoleh', bukan orang yang mempunyai kepentingan di dalam 'harta yang diperoleh'. Dalam lain perkataan, perkataan-perkataan 'kepentingan bersama' merujuk kepada kepentingan berbagai yang diperoleh oleh pembeli-pembeli di dalam hartanah tersebut, bukan 'kepentingan

bersama' yang dikongsi oleh pembeli-pembeli lain hartanah tersebut. Oleh yang demikian, klausa 5 dan 8 Perjanjian Standard tidak memberi maksud 'kepentingan bersama' dalam tafsiran bahagian (d). Dari itu, perniagaan plaintif-plaintif tidak boleh dikatakan termasuk di dalam tafsiran kepentingan di bawah bahagian (d) s 84 (lihat perenggan 108 dan 109).

(8) Persoalan yang plaintif-plaintif perlu mematuhi kesemua keperluan-keperluan relevan di bawah Bahagian IV Divisyen 5 tidak timbul kerana keperluan-keperluan ini tidak boleh dikenakan ke atas plaintif-plaintif kerana perniagaan plaintif-plaintif tidak tertakluk di bawah tafsiran 'kepentingan' di bawah s 84 Akta tersebut (lihat perenggan 124).]

Notes

For a case on purchase of business generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 536.

For cases on offences by companies generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 506–510.

Cases referred to

Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors [1983] ACLC 1130 (fold)
Attorney-General for New South Wales v Australian Fixed Trusts Ltd & Anor [1974] 1 NSWLR 110 (refd)
Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW); Ex nel Corporate Affairs Commission 36 ALR 257 (refd)
Brisbane Unit Development Corp Pty Ltd v Deming No 456 Ry Ltd & Ors 7 ACLR 729 (refd)
Butterworth v Lezemo Pty Ltd [1983] 8 ACLR 737 (refd)
Kerr v Visa Vacations Pty Ltd 11 ACLR 14 (refd)
Maunder-Hartigon v Hamiton [1984] 2 ACLC 438 (refd)
Munna Beach Apartments Pty Ltd v Kennedy & Ors [1983] 1 ACLC 721 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
R v Commons 10 ACLR 873 (refd)
R v Smith [1991] 3 NZLR 740 (refd)
Streeter v Pacific-Seven Pty Ltd 9 ACLR 790 (refd)
Taxes Commissioner v Australian Mutual Provident Society [1902] 22 NZLR 445 (refd)
WA Pines Pty Ltd v Hamilton [1980] WAR 225; [1980] ACLC 34 (refd)
Wade v A Home Away Pty Ltd [1981] VR 475 (refd)
Waldron v MG Securities [1975] VR 508 (refd)
Wragg v Palmer [1919] 2 Ch Div 58 (refd)

Legislation Referred to:

Companies Act (Cap 50) [Sing] s 107
Companies Act 1961 [Aust] s 76
Companies Act 1965 s 84, (1), (i)(d), 85, 88(1)(c)(i), (ii), (iii), (iv), (d), (h), 90(2)(a), 91, 93(1)(b), 95, Part IV Division 5

Wong Kian Kheong (Yap Boon Hau with him) (Lee Hishamuddin) for the plaintiff.
Mohd Redzuan Abdullah (Mohd Sufiyan Mohd Mokhtar) (Companies Commission, Malaysia) for the defendant.

Ramly Ali J:

[1] The plaintiffs' application in the originating summons dated 25 May 2004 seeks, *inter alia*, the following orders:

(a) a declaration that the plaintiffs' business is not within the meaning of 'interest' in s 84(1) of the Companies Act 1965;

(b) a declaration the an approved deed under Part IV, Division 5 of the Companies Act 1965 is not required for the plaintiffs to offer their services to the public; and

(c) a declaration that by offering the plaintiffs' services to the public without an approved deed under Part IV, Division 5 of the Companies Act 1965, the plaintiffs do not contravence s 91 of the Act.

BRIEF FACTS

[2] The plaintiffs are related companies. The first plaintiff is the holding company of the other plaintiffs, The plaintiffs business involves 'cemetery development'. The plaintiffs purchased lands to be developed as 'burial plots' and 'memorial park', including columbaric structure comprising of urn compartments and other infrastructure such as temples, chapels, rest areas, shades and parks for landscaping. The second plaintiff is the marketing agent of other plaintiffs. The second plaintiff advertises to the public to offer the purchase of burial plots and urn compartments. There are standard form agreements between the Purchaser and the plaintiffs. The standard form agreement for urn compartments is in exh 'A–5' and the standard form agreement for burial plots is in exh 'A–6' (collectively referred to as 'Standard Agreements'). The Standard Agreements allow the purchaser to use the burial plots and urn compartments subject to the terms provided therein. It is not disputed that under the Standard Agreements the purchaser of the burial plots and urn compartments do not receive any profit, reward, interest, rent or monetary gain from the plaintiffs. These facts are found in the plaintiffs' affidavit in support of the application. The defendant did not file any affidavit in reply. Hence, the averment of facts in the plaintiffs' affidavit are deemed admitted (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286).

[3] In fact in their submission, the defendant admitted that they did not file any affidavit in reply as they are of the view that this case involves purely legal interpretation of Part IV Division 5 of the Companies Act 1965.

[4] The purchasers of urn compartments acquire a licence to use the urn compartments. In the Standard Agreements relating to urn compartments, the purchasers agree that:

I agree to purchase the licence for an urn compartment identified hereunder at the purchase price specified herein upon the terms and subject to the conditions stated overleaf.

[5] To identify the right of purchasers of urn compartments, the particulars of pavilion number, number of urn permitted, side, level, compartment number and the size are all referred to as 'Particulars of Urn Compartment to which this Licence Relates'. Clause 2 of the Standard Agreement provides that:

Subject to full payment of the purchase price, the purchaser shall be entitled to the licence to use the urn compartment without any interference or interruption whatsoever by the plaintiffs or any person claiming under or in trust for the plaintiffs.

[6] Under cl 5, it is provided that the purchasers of urn compartments and his invitees shall have free and unhindered access to the compartments and the car park areas and other areas designated for worship in common with other licencees and all persons having the same or similar rights.

[7] Clause 6, provides that the purchasers of urn compartments are deemed to be licencee until the beneficiary is nominated. The purchasers of urn compartments are only permitted to use the compartments 'solely for the repose of an urn unless it is specified that such compartment is available for two urns' (see cl 3 of the Standard Agreements). If the compartment identified in the Standard Agreements is not available for use, the plaintiffs will make available an alternative compartment to the purchasers. The clauses are clear. The purchasers of urn compartments are mere licencees to use the urn compartments provided by the plaintiffs. The purchasers acquire no interest or expectation or right of receiving benefit from the use of the urn compartments.

[8] In respect of the burial plots, the purchasers purchase the licence for a burial plot. In the Standard Agreements relating to burial plot, the purchasers expressly agree that:

I agree to purchase the licence for a burial plot identified hereunder at the purchase price specified herein upon the terms and subject to the conditions stated overleaf.

[9] It is also clear from the clauses in the Standard Agreements that the purchasers of burial plots are only acquiring a right to use the plot for human internent (see cl 11 of the Standard Agreement). The purchasers of burial plots are mere licencee.

[10] Clause 8 of the Standard Agreements provides that:

The plot is sold together with the right to the purchasers in common with the vendor (the plaintiffs) and the purchasers of all other plots to use the roads, common areas and other facilities and amenities, appertenant to the enjoyment of the plots.

[11] Clause 9 further provides:

that vendor (the plaintiffs) or its appointed trustee will maintain the plots and the entire development known as 'Nirvana' in an orderly manner with the requisite landscaping.

[12] Clause 10 provides:

> After the land has been fully developed the vendor (the plaintiffs) will transfer the same including the plot subject to the sale and purchase herein to its trustee to be held by such trustee upon trust for the purchasers in common with all purchasers having interest therein.

[13] Reading all the clauses in the Standard Agreements, the court is satisfied that the said Standard Agreements, be it for urn compartments or burial plots are actually agreement to grant licence for the purchasers to use the urn compartments or burial plots for limited purposes. Although the words 'Purchaser' and 'Vendor' are used the Standard Agreements, the true nature, in view of the express clauses therein, show that the purchasers are only acquiring a 'licence to use'.

[14] The defendant being the enforcer of the provisions of the Companies Act 1965 claimed that the plaintiffs' business amount to an 'interest' as defined in s 84 of the Act and that the plaintiffs are required to comply with the relevant provisions under Part IV of Division 5 of the Act for making any offer of their business and services to the public, failing which the plaintiffs are committing an offence under s 91 of the same Act.

[15] The plaintiffs on the other hand contended that their said business is not an 'interest' as defined in s 84 of the Act, and therefore they are not required to comply with the provisions of Part IV Division 5 of the Act. The conducts of the defendant necessitate the application in the present originating summons by the plaintiffs in order to ascertain the exact nature and scope of the plaintiffs legal obligations under Part IV Division 5 of the Companies Act 1965 vis-a-vis the operation of their business.

LEGAL ISSUES

[16] The legal issues to be determined by the court are as follows:

(i) whether the plaintiffs' business activities fall within the definition of 'interest' in s 84 of the Companies Act 1965; and

(ii) whether the plaintiffs must comply with the requirements under Part IV Division 5 of the Act for offering their *business and services to the public by having, inter alia*, an approved trust deed; and

(iii) whether the plaintiffs are committing a offence under s 91 of the Act for failure to comply with those requirements in offering their business and services to the public.

FINDINGS OF THE COURT

[17] The objective of Part IV Division 5 of the Act is to provide adequate protection to potential investors or purchasers of 'interest', in a wide range of investments that go beyond shares and debentures of a company, by regulating public offering of 'interest' other then shares and debentures. Section 91 of the Act provide:

A person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

[18] It is not disputed that at all material times, the plaintiffs do not have on 'approved deed 'when making the offer to the public in relation to the plaintiffs' business. It is the plaintiffs' contention that the plaintiffs' business does not fall within the meaning of 'interest' as defined under s 84 of the Act, and thus does not require any approved deed. The paramount issue in the present application is whether the plaintiffs' business falls within the meaning of 'interest' under s 84 of the Act.

SECTION 84 OF THE ACT

[19] Section 84 of the Act defines 'interest' as:

… any right to participate or interest, whether enforceable or not and whether actual prospective or contingent:

(a) in any profits assets or realisation of any financial or business undertaking or scheme whether in Malaysia or elsewhere;

(b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right of interest is led to except (expect) profits rent or interest from the efforts of the promoter of the enterprise or a third party;

(c) in any time-sharing scheme; or and

(d) in any investment contract.

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset …

[20] The Malaysian Courts have not deliberated on the scope of 'interest' as defined under s 84 of the Act. Our s 84 is in *pari materia* with s 107 of the Singapore Companies Act (Cap 50). There is also no reported decision in Singapore on their s 107. Both s 84 of our Act and s 107 of the Singapore Companies Act are based on s 76 of the Australian Companies Act 1961 (s 76 of ACA). Hence, it is necessary to refer to the Australian decisions on s 76 of ACA for our guidance in interpreting s 84 of our Act.

[21] There are four limbs in the definition of 'interest' in s 84 of the Act namely sub-ss (a), (b), (c) and (d). The court will examine each limb in the following paragraphs.

LIMB (A) — SECTION 84(A)

[22] The important elements of the definition of 'interest' in limb (a) of s84are:

A any right to participate or interest ... in any profits, assets or realisation of any ... business undertaking or scheme ...

[23] The leading case on s 76 of ACA is the decision of High Court of Australia in *Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW): Ex nel Corporate Affairs Commission* 36 ALR 257. In that case (*Australian*
B *Softwood*) the investors was invited to enter into a scheme under which they would agree to buy trees from the company. They would be planted by the company on the company's land, albeit on a designated area set aside for each investor's trees. Thereafter, it was the company's exclusive obligation to maintain the trees and the investors had no rights with respect to the trees or
C plantation until they were told to come and remove them when they were matured. If they did so choose to come and get them, then they were removed as their property but, if as would have been the normal case, they did not choose to exercise this right themselves, then they were deemed to have appointed an associate company as their agent to sell and remove the trees.

D **[24]** In considering s 76 of ACA, Mason J made a general observation on the meaning of 'interest' as follows:

(a) a very wide meaning should be given to 'interest';

(b) the court should not read down the very comprehensive definition of 'interest';

E (c) the definition 'interest' is so general and all-embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words. The hazards of adopting such a course are not dispelled by the absence of a supporting context.

F **[25]** Before *Australian Softwood* was decided, Young CJ in *Wade v A Home Away Pty Ltd* [1981] VR 475 at 476 approached s 76 of ACA in the following words:

G I have given careful consideration to the question whether the court should look at the literal construction of the language used by Parliament and, if it finds that the scheme falls within it, hold that it is prohibited or whether the court should look at the substance of the scheme and say whether the scheme as a whole falls within the general type of scheme which it is thought it is the purpose of the legislation to prevent. In my opinion, the former approach is the correct one for the court to adopt.

[26] In *Australian Softwood*, Mason J considered whether the transaction in
H that case amounted to profit a prendre. Profit a prendre is described as a right to take something off another person's land or to take something out of the soil, including portion of the soil itself. Mason J concluded that '... if the trees were to be left on the land for the advantage of the purchaser so that he would derive benefit from further growth, then the contract was for the sale of an
I interest in land. If, on the other hand, the purchaser was to enter and take the timber immediately, he would derive no benefit from the land and the contract was one for the sale of goods.

[27] Having analysed the facts of that case, Mason J held that '... the evident intention of the parties was that the grower was to have a continuing interest in the land which would culminate in his severance and removal of the trees'. He proceeded to hold that 'if the grower has an interest in the nature of a profit a prendre then he has an interest in the assets of the scheme'. On this basis, Mason J was satisfied that the activity in question was within the meaning of para (a) of s 76 of ACA.

[28] Wilson J in Australian Softwood further held that 'Although the growers have no right under the agreement to enter the land during the growing period, they can call on the trustee to protect their interests and to ensure that the trees are properly cared for'. Wilson J too agreed that the activity in that case was within the meaning of 'interest' in s 76 of ACA.

[29] The basis for the High Court of Australia to hold that the transaction in Australian Softwood fell within the meaning of s 76 of ACA was that the investor did have interest in the property of the offerer, in that, the investor acquire the right in the form of profit a pendre.

[30] Before going through the whole phrase in limb (a) of s 84, the court will analyse the meaning of the key words used in the phrase. The key words are 'profit', 'participation', 'business undertaking or scheme'.

MEANING OF 'PROFIT'

[31] 'Profit' was defined in *Waldron v MG Securities* [1975] VR 508 at p 529 as:

> One of the definitions of 'profit' given in the Oxford English Dictionary is 'that which is derived from or produced by some source of revenue'. Webster defines it as 'the income of invested property — it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business', and Dr Johnson defines it as 'Gain — pecuniary advantage'. It is in this sense that the word should be construed in this definition.

(See also: *Maunder-Hartigon v Hamiton* [1984] 2 ACLC 438 at p 447).

[32] The defendant argued that the purchasers of the plaintiffs business and services take part in the 'profit' of the plaintiffs business. The defendant urged the court to adopt a wide meaning of the word 'profit' in the definition of 'interest' in s 84 of the Act. The defendant submitted that 'profit' does not necessarily mean 'economic gain'. To the defendant, the element of economic advantage has to be decided not strictly based on a financial gain, but also benefits, advantage and gains derived from the services provided by the plaintiffs to the purchasers under the plaintiffs business, although these benefits, advantage and gains are not quantifiable in cash terms.

[33] The court believes that the defendant's submission that 'profit includes income, revenue or other benefit, advantage or gain itself is derived or summarised

from the decisions in *Maunder-Hartigon v Hamilton* [1984] 2 ACLC 438 at p 447 and *Waldron v MG Securities* [1975] VR 508 at pp 528 and 529.

[34] In *Waldron v MG Securities* it was held that:

> The word profits in this definition does not in my view mean the difference between the receipts of a company and its expenditure. One of the definitions of profit given in the Oxford English Dictionary is 'that which is derived from or produced by some source of revenue'. Webster defines it as 'the income of invested property — it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business', and Dr Johnson defines it as 'Gain — pecuniary advantage'. It is in this sense that the word should be construed in this definition.

[35] The three sources on which *Waldron* derived the definition of 'profit' in fact support the plaintiffs contention that 'profit' must mean economic gains. The words 'benefit or advantage' are used in the context of 'income of invested property'. The word 'gain' is defined as 'pecuniary advantage'. Hence, the case *Waldron* does not support the defendant's contention on wide meaning of the word 'profit', but in fact support the plaintiff's contention that the word 'profit' means pecuniary gains. In the plaintiffs' business, the benefit that purchasers enjoy is mere licence to use the urn compartments and burial plots, together with other facilities developed by the plaintiffs. It is undisputed that there is no economic or pecuniary gain to the purchasers. The defendant, in para 18 of their written submissions also agree that this business is related to a non-economic purpose, in so far as the purchasers of the urn compartments or burial plots in concerned.

[36] In *Maunder-Hartigon* it was said that profit has been considered by Pape J in *Waldron v MG Securities* as being 'the income of invested property — it includes any benefit or advantage accruing from the management, use or sale of property or from the conduct of business or as 'gain' — pecuniary advantages.

[37] Clearly the essential element of 'profit' in Mounder-Hartagon decision refers to pecuniary advantage. The full text of *Mounder-Hartagon* decision in fact disapprove the defendant's contention that the word 'profit' include non-economic benefit. The purchaser of the urn compartments or burial plots in the present case do not obtain any pecuriary advantage based on the undisputed facts. The contention of the defendant in this issue is thus baseless. Further, 'profit' is understood as involving financial gain from some undertaking (seethe decision of the Supreme Court of Queensland in *Kerr v Visa Vacations Pty Ltd* 11 ACLR 14 at p 20).

[38] In *Wade v A Home Away Pty Ltd* [1981] VR 475 (Supreme Court of Victoria), Jenkinson J made the following observations:

> In the reasons for judgment of Gray, which we were informed that King J had adopted in determining the application of opinion is expressed that 'the interest which is defined in s 76 is confined to an interest in a scheme or arrangement that

offers to participants a prospect of profit or economic advantage. Furthermore, the element of economic advantage must be something more than the possibility of an economic advantage which in quite incidental to the principal non-economic purpose of the scheme.

[39] Admittedly, there are authorities to support the proposition that the word 'interest' is very wide, but this however does not necessarily mean a wide meaning must also be attached to the word 'profit'. As observed in all the above authorities, the contention of the defendant with regard to the wide meaning of 'profit' is untenable.

[40] On the above authorities, the court is of the view that 'profit' in the context of limb (a) of s 84 of the Act must be read to mean economic benefit or pecuniary advantage or pecuniary gains, but does not include non-economic or non-pecuniary advantage.

MEANING OF 'PARTICIPATION'

[41] In *WA Pines Pty Ltd v Hamilton* [1980] WAR 225; [1980] ACLC 34, Jones J held that 'the concept of 'participation' involves some form of sharing with others even if only with the promoter of the scheme'. This concept was adopted by Wylie J in *R v Smith* (1991) 3 NZLR 740 (High Court Auckland, New Zealand). In *Butterworth v Lezemo Pty. Ltd* (1983) 8 ACLR 737, Nicholson J considered that a mere right to use industrial property could not be regarded as conferring a right to participate in it unless mere use could be equated with 'participation'. He thought that 'participation' went beyond the mere right to use and bore the connotation that the participant, even if he had no proprietary interest in the asset, had an 'eventual right or expectation of receiving something in respect of it'. Hence, a mere use of the asset does not constitute 'participation in assets'.

[42] For the purpose of our s 84(a) of the Act, the court is pursuaded to accept and adopt the concept of 'participation' as outlined in the above authorities ie it involves some form of sharing with others even if only with the promoters of the scheme.

MEANING OF 'BUSINESS UNDERTAKING AND SCHEME'

[43] The meaning of 'undertaking and scheme' was explained in *Australian Softwood*'s case as 'all that the word 'schemes' requires is that there should be 'some programme, or plan of action… . There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in the plan or that there must be a share or pooling of profit or receipts'.

[44] The meaning of 'business undertaking' was also explained in *Wade v A Home Away Pty Ltd* (1981) VR 475 at p 492 by Jenkinson J. In that case, a company offered for sale to the public undivided shares in the freehold estate

in each of three parcels of land, on each of which was erected a number of residential apartments. The contract of sale of each share included terms that the vendor would grant a lease of the parcel of land in the freehold estate of which that share was being purchased for a term of 99 years at a nominal rent to a company which would hold the term on trust for the holders of units under a trust deed to be made between A Home Away Pty Ltd, a company associated with the trustee; that each undivided share purchased would entitled the purchaser to one unit in the trust and that each unit would confer on the holder a right to occupy on of the apartments on that land for a specified period (in one case, seven, in another 14 days) in each year; that the right of occupancy would be subject to payment of a service charge to A Home Away Pty Ltd which would manage the apartments, allocate them between the unit holders and determine the dates between which each unit holder should enjoy his period of occupancy. The proposed trust deed contemplated that each unit holder might elect to occupy, in lieu of an apartment on the land, an apartment on other land which should have been made the subject of a similar 'time-sharing' scheme and in respect of which an arrangement should have been made for reciprocal exchange of occupancy rights.

[45] Having considered the above facts, Jenkinson J held, at p 492, that 'all this in my opinion amounts to the conduct of a commercial enterprise in a systematic and regular way with a view to profit. There may be lacking that element of continuity or repetition which has been judicially identified as forming the carrying on of a business, for what I am now examining are activities of Australiawide Investments Pty Ltd which are to be regarded as coming to a conclusion upon completion of the sales of the shares in the fee simple estate in the particular parcel of land, of which the sale by that appellant is the subject of consideration. But in my opinion the expression 'business undertaking', in the legislative context which the definition of interest supplies, comprehends a single venture. The language is in common speech apt to comprehend such a venture, and there is nothing in the provisions for which the definition is supplied which I think might influence a Court to construe the expression in a narrower sense'.

[46] Further, at p 496, Jenkinson J also held that:

> The legislative contexts which Pt IV of the Companies Act 1961 and the Security Industry Act 1975 supply may appear to provide support for a construction of the expression 'interest ... in any assets of any business undertaking' which would confine its application to an interest which contributes to the achievement of some kind of investment by the holder for financial gain by him. But I think that those contextual considerations amount to no more than this: that an expectation is aroused that Pt IV of the Companies Act 1961 and the Securities Industry Act 1975 will be concerned only with instruments and arrangements which have something in common with stocks and shares and bonds and notes and debentures. It is true that the later instruments are almost invariably acquired in expectation of financial gain. But it is also true that such instruments are almost invariably created and

offered for acquisition in expectation of financial gain. The expectation which the placement in that legislative context of provisions with respect to 'interests other than shares, debenture, &c' (as the heading of Div 5 of Pt IV of the Companies Act 1961 describes them) excites may be as well fulfilled by the conclusion that it is with interests offered for financial gain to the offeror that the legislature is concerned as by the conclusion that it is with interest to be acquired by the offeree for that purpose.

[47] The principle that we can discern from the above passages is that, in order to constitute a 'business undertaking' there must be:

(i) conduct of a commercial enterprise in a systematic and regular way;

(ii) the conduct of commercial enterprise with a view to profit;

(iii) it does not matter if there is lacking of continuity or repetition; and

(iv) it could be a single venture.

RIGHT TO PARTICIPATE IN PROFIT OF BUSINESS UNDERTAKING

[48] Based on the meaning of the key words, transaction is said to give 'right to participation in profit of business undertaking or scheme' when there is sharing with others gain or pecuniary advantage derived from some programme, or plan of action, in a systematic and regular way, with a view to profit, which may be just a single venture.

[49] In *Butterworth v Lezemo Pty Ltd* [1983] 8 ACLR 737 it was held by Nicholson J that 'I do not think that the word 'profit', when read in its context, and particularly in conjunction with the words 'right to participate or interest' should be interpreted as extended to profits arising solely as a result of the efforts of the purchaser of a business'. Hence, if the profit obtained by the purchasers attributed to their sole effort, they are not participating in the 'profit' of the business undertaking.

[50] In our case, it is not disputed that the purchasers do not receive any profit, reward, interest, rent or monetary gain from the plaintiffs' business. They do not share the profit in the plaintiffs business. Hence, the interest of the purchasers is not 'a right to participate in the profit of the business undertaking or scheme'.

RIGHT TO PARTICIPATE IN THE ASSET OF BUSINESS UNDERTAKING

Meaning of 'participate in the asset'

[51] Jenkinson J in *Wade v A Home Away Pty Ltd* [1981] VR 475 at p 492 was of the view that an interest in any one asset is sufficient to constitute 'interest in the asset' in s 76 of ACA.

[52] In order to constitute participation in assets, one must at least have a right or expectation of receiving something out of the assets. In *Butterworth v Lezemo Pty Ltd* [1983] 8 ACLR 737 at p 749 it was held:

> ... I do not think that it can be properly regarded as conferring a right to participate in it unless mere user can be equated with participation. I think that participation goes beyond a mere right of use and bears a connotation that the participant, even if he has no proprietary interest in the asset, has an eventual right or expectation of receiving something in respect of it.

[53] Hence, mere use of the asset does not constitute 'participation in assets'.

[54] In *Attorney-General for New South Wales v Australian Fixed Trusts Ltd & Anor* [1974] NSWLR 110, a company made an advertisement to invite the public to contribute to a retirement fund. The members were to engage the company by way of a trust deed. The trustee was to keep account of the members' contribution and they would take up unit trust established and managed by the trustees associated companies. The benefits were to be paid to them on their retirement. Street CJ in Eq held that:

> It was (the transaction), in its bare essentials, an investment fund, with the right to receive moneys thereunder deferred until retirement or other date or circumstances specified in the deed ... he clearly had an expectation … and an equitable interest, in the assets committed to the undertaking or scheme. In my view this was more than sufficient to constitute his rights thereunder as an interest within para (a) of the definition of that word in s 76(1).

[55] From Street CJ's observation, there must be two elements in order to satisfy limb (a), namely:

(a) there must be some expectation and/or interest created in the assets of the business; and

(b) by such expectation and/or interest, the investor is expected to receive benefit, whether immediately or in future.

RIGHT TO PARTICIPATE IN THE REALISATION OF BUSINESS UNDERTAKING

[56] The final section of limb (a) of the definition of 'interest' in s 84(a) refers to 'a right to participate or an interest in the realisation of any financial or business undertaking or scheme'. Whether or not there was or is a financial or business undertaking or scheme operative in this case, it is, clear that it was never intended (in the Standard Agreements) that the purchasers should have the right to participate in or have any interest in the realisation of any assets other than the assets acquired by them by reason of their purchase of the plaintiffs' business, which become their own assets and not the assets of the plaintiffs.

TRANSACTIONS — JUDICIALLY EXCLUDED AS 'INTEREST IN ASSETS'

[57] In *Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors* [1983] ACLC 1130 the plaintiff applied for summary judgment for specific performance of a contract for the sale and purchase of a home unit. Specific performance was resisted on the footing that the sale of the home unit and the undivided share in the common property in each case was illegal as it resulted from an invitation to the public to purchase an interest within the meaning of s 76 of ACA.

[58] Connolly J held at p 1132:

> the question however is whether the invitation to the public to purchase the projected units is an invitation to purchase an interest in the assets of the financial or business undertaking or scheme. Those who conduct such undertaking and schemes commonly hold property both real and personal. It is equally common for them to dispose of such assets from time to time. When a motor car or a parcel of land surplus to the requirements of a trading corporation is sold the purchaser does not in my judgment acquire an interest in an asset of the trading corporation. On the contrary he acquires something which has ceased to be an asset of that corporation.

[59] The Supreme Court of Queensland subsequently after the decision of *Applewood*, delivered another decision of similar facts in *Brisbane Unit Development Corp Pty Ltd v Deming No 456 Ry Ltd & Ors* 7 ACLR 729. The question in that case was whether the invitation to the public to purchase the projected unit is an invitation to purchase an interest in the assets of the financial or business undertaking or scheme. Connolly J used the identical wording in *Applewood* (atp 730):

> Those who conduct such undertaking and schemes commonly hold property both real and personal. It is equally common for them to dispose of such assets from time to time. When a motor car or a parcel of land surplus to the requirements of a trading corporation is sold the purchaser does not in my judgment acquire an interest in an asset of the trading corporation. On he contrary he acquires something which has ceased to be an asset of that corporation.

[60] *Butterworth v Lezemo Pty Ltd* 42 ACSR 268 was a case which concern the legality of a franchise agreement for the operation of a fast-food outlet, being one of a kind which had been offered publicly. The plaintiffs had bought the ordinary business assets such as stock and plant outright and had entered into a franchise agreement permitting them to use the 'industrial property' such as goodwill, recipes, trademarks and so on.

[61] Nicholson J decided that the acquisition of the business assets did not fall within the definition of interest. He held:

> In substance, I think that the answer to this question is that they firstly acquired the right to use the relevant industrial property belonging to the defendant and, secondly, the contractual right to use the services of the defendant for the purposes of advertising and marketing of their products, management assistance and training ... I

> agree with the contention of counsel for the defendants that all that was acquired was a license to use the industrial property sufficient to enable the plaintiffs to resists any action or passing-off or infringement of the Defendants trade marks during the currency of the agreement. ... I am unable to accept that a mere right to use industrial property without more can amount to an interest in it. Similarly, I do not think that it can be properly regarded as conferring a right to participate in it unless mere user can be equated with participation. I think that participation goes beyond a mere right of use and bears a connotation that the participant, even if he has no proprietary interest in the asset, has an eventual right or expectation of receiving something in respect of it ... In my opinion, the contractual rights conferred upon the plaintiffs by the agreement similarly do not confer upon them a right to participate or an interest in assets, for I consider that they confer a mere contractual right to use the services of the defendants for the various purposes set out in the agreement.

[62] The word 'participate' ordinarily means to share, or take part (see: *R v Commons* 10 ACLR 873 at p 880).

[63] In *Streeter v Pacific-Seven Pty Ltd* 9 ACLR 790 at p 793, it was held that:

> I still do not consider that the mere right of user accorded the plaintiffs in relation to this industrial property gave them any 'interest' or 'right to participate' in it ... I do not consider that the concept of participation in the assets of an undertaking extends to mere use of them. The word participate ordinarily means to share or take art. One uses assets by employing them for some purpose or other. It is my view inapt to describe the mere use of assets as 'taking part' of or in them, or as 'sharing' them. Participation in assets would in short, involve something more than mere use. If the legislature had intended the definition to extend to mere use, one might surely have expected it to say so, directly and simply.

[64] In the case of *Kerr v Visa Vacations Pty Ltd* 11 ACLR 14 at p 22, the scheme involved the purchase of three weeks holiday which could be taken over threer years at $900 and holidays at the rate of $150 per week thereafter subject to the renewal of a club subscription. Dowsett J held:

> the occupier of a unit in a building for holiday purposes ... is traditionally characterised as a licensee with a mere contractual right enforceable against the hotel keeper. Ithas not generally been thought that the rights of such a licensee could properly be characterised as rights in respect of the property.

[65] From the above authorities, it appears that there are at least three classes of transactions that do not fall within the meaning of 'participation in assets', namely:

(a) if a purchaser purchases the assets of the business undertaking. In such a case, the assets cease to be the assets of the business undertaking. Therefore, it cannot be considered as participation in the assets of the business undertaking;

(b) if the purchaser merely have contractual rights to use the assets of the business undertaking. In such a case, the purchaser does not 'participate', because mere using is not understood to be 'participating';

(c) if the purchaser is a licensee. The licensee has mere contractual right against the licensor. He has no right or interest over the assets.

[66] In order to examine whether the plaintiffs offered the purchasers 'right to participate in the assets', it is important to examine what the purchasers in fact 'acquired' from the plaintiffs business as specified the Standard Agreements, both in respect of the urn compartment as well as in respect of the burial plots. (The same approach was adopted by the court in *Butterworth v Lezemo*.)

[67] From the relevant clauses in the Standard Agreements, the purchasers of urn compartments are mere licencee to use the urn compartments provided by the plaintiffs. The purchasers acquire no interest or expectation or right of receiving benefit or economic advantage from the use of the urn compartments. The Standard Agreements are agreements to grant licence for the purchasers to use the urn compartments for limited purpose. Although the words 'purchaser' and 'vendor' are used in the Standards Agreements the true nature, in view of the express clauses in the Standard Agreements show that the purchasers are only acquiring a licence to use.

[68] In respect of the Standard Agreements relating to burial plots:

(i) clause 1 provides the plot is purchased by the Purchasers of burial plot free from all encumbrances;

(ii) clause 2 provides no interment is permitted unless the purchase price is fully paid;

(iii) clause 3 provides a certificate signed by the plaintiffs shall be the evidence of ownership;

(iv) clause 6 provides the purchasers of burial plot may nominate a beneficiary. If no person has been nominated, the Purchasers shall be the beneficiary of the lot;

(v) clause 13 allows the purchasers of burial plot to transfer the plot provided that the purchase price has been paid and no interment is carried out.

[69] From the above clauses, the purchasers of burial plots acquire the burial plots designated in the Standard Agreements. The plaintiffs retain no proprietary right in respect of the burial plots. This proportion is supported by the use of words like 'purchase', 'purchase price', 'ownership', 'sold', 'beneficiary'. Further the Standard Agreements also permits the purchasers of burial plot to sell the plot without the consent of the plaintiffs. These clauses show that the plaintiffs have parted their proprietary rights of the plots, and only retain a right to manage the area in which the plots are situated. Hence, the proprietary rights of the burial plots pass to the purchasers by entering into the Standard Agreements. In true and in substance, the burial plots cease to be the assets of the plaintiffs. Applying the principles in *Applewood Pty Ltd* and *Brisbane Unit Development Corp Pty Ltd* the burial plots cannot constitute assets of the plaintiffs and hence there is no 'right to participate or interest in the assets' of the plaintiffs business.

[70] In short:

(a) the purchasers do not have interest or right to participate in the profit of plaintiffs' business, as the purchasers do not enjoy any financial gain by entering into agreements in terms of the Standard Agreements;

(b) the purchasers cannot be said to have an interest or right to participate in the asset of the plaintiffs' business, because they are licensee and merely obtain a right to use the urn compartments and burial plots;

(c) assuming the liberal interpretation is given to the Standard Agreements relating to the burial plots, the terms therein show that the plaintiffs have parted the proprietary right of the identified burial plots to the purchasers. The burial plots ceases to be the assets of the plaintiffs and hence the purchasers do not acquire any interest or right to participate in the assets of the plaintiffs' business.

LIMB (B) — SECTION 84(B)

[71] The material parts of the meaning of 'interest' in s 84(b) are:

> any right to participate or interest ... in any common enterprise … in which the holder of the right or interest is led to expect profits, rent or interest from the effort of the promoter of the enterprise or a third party.

[72] Accordingly what has to be determined is, first, whether the purchasers acquired a right to participate or an interest in any common enterprise, and secondly, whether it was one in respect of which the purchasers were led to expect profits from the effort of the plaintiffs, as promoter.

'COMMON ENTERPRISE' AND 'EFFORT'

[73] 'Common enterprise' was defined in *Australian Softwood*'s case where Mason J held:

> An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts or profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise.

[74] Further, Pape J in *Waldron v MG Securities* held:

> para (b) (of s 76(1) of ACA) is fulfilled by facts such as the present, namely, where it is the promotional activity, in an intermediary sense, which will procure he interest for the investor.

[75] Nicholson J in *Butterworth v Lezemo Pty Ltd* held:

> The use of the word 'from' in the definition in connection with the phrase 'the efforts of the promoter of the enterprise' suggests some direct relationship between such efforts and the expectation of profit ... any expectation of profit in this case was dependent upon the successful conduct of the business by the plaintiffs, and not upon the efforts of the defendants.

[76] The combined explanation of 'common enterprise' in *Australian Softwood*, *Waldron v MG Securities* and *Butterworth v Lezemo Pty Ltd* is that an activity which is 'common enterprise' must be an 'intermediary activity' with a view to earn profit. There must also be at least two parts of operations, one from the promoter (the plaintiffs) and the other from the investors (the purchasers). There must also be a common objective of the operations namely to earn profit. Hence, the 'common enterprise' must be a mean to achieve an objective that pulls the two parties together. If the objective is achieved by merely entering into the transaction, without any further purpose that is intended to achieve by that transaction, for instance, a sale and purchase of good, it cannot be a 'common enterprise' within the meaning of limb (b). This proposition is supported by Nicholson J in *Butterworth v Lezemo Pty Ltd* (at p 759) that:

> I think that the efforts referred to in the definition must mean continuing efforts subsequent to the original transaction. The purchaser of any business who pays a portion of the purchase price in respect of goodwill must be taken to have been led to expect profits from the past efforts of the vendor. I think that the word 'efforts' used in conjunction with the expression 'common enterprise' suggests that the efforts contemplated by the definition are efforts of a continuing nature subsequent to the entering-into of the original transaction.

[77] Further, in *Streeter v Pacific-Seven Pty Ltd*, De Jersey J held:

> The efforts being referred to in the definition must in my view be read as efforts continuing after the execution of the agreement That follows especially from the reference to such 'effort' in the context of the continuing 'common enterprise'.

[78] It is the court's view, that 'common enterprise' must be something which both (or more) parties devise as a mean to gain 'profit, rent or interest'. There must also be continuing effort after the original transaction. Without such common objective to gain 'profit, rent or interest' as an ultimate objective and continuing transaction, there cannot be 'common enterprise' within the meaning of limb (b).

[79] In *Butterworth v Lezemo Pty Ltd & Anor*, Nicholson J accepted that any expectation of profit had of necessity to be based upon the evidence of the franchisee and not those of the franchisor, because once the agreement had taken effect, the franchisee had thereafter conducted an independent business on his own account.

[80] Further, the efforts of the franchisor contemplated by the agreement were at best indirect and were removed from the actual production of income

that could lead to the production of profit. The efforts required of the franchisor could not of themselves be said to lead to an expectation of the production of profit.

[81] This case (*Buterworth v Lezemo Pty Ltd*) illustrates the principle. In this case, after the original transaction, the franchisee conducted his business independently. If there is no continuous transaction after the parties entering into the original transaction, and there is no common objective in the original transaction, the transaction is not within the meaning of limb (b).

[82] In order to fall within the meaning of limb (b), there must firstly be a right to share in the common enterprise, (see *Maunder-Hartigon v Hamilton*).

[83] Nevertheless, in our present case:

(a) the purchasers are merely acquiring the rights to use the urn compartments and burial plots. The objective of the Standard Agreement is merely to grant license to the purchasers;

(b) the Standard Agreement is not for the purpose of earning profit, rent or interest from the plaintiffs' business;

(c) there is no joint effort in operation of an enterprise for furtherance of common objective;

(d) the transaction in question is not an 'intermediate activity', but is the final transaction; and

(e) there is no continuous effort required on the part of the Purchasers after they have entered into the Standard Agreements.

[84] There is no common objective that unites the plaintiffs and the purchasers. The plaintiffs may be said to obtain profit, but the purchasers are merely granted the right to use the urn compartments and burial plots. Further, there is no 'operation' that is required from the purchasers. Payment of the agreed consideration was the purchasers' only obligation. There is no 'continuing effort' from the purchasers. Hence, it cannot be said that the purchasers are involve in any form of 'operation'. Neither do the purchasers enjoy any profit from the agreements signed with the plaintiffs, except the right to use the urn compartments and burial plots.

[85] In the premise, it can be concluded that the operation of the plaintiffs' business as evidence from the Standard Agreement, is not within the meaning of 'interest' as defined in limb (b) of s 84.

LIMB (C) — SECTION 84(C)

[86] Any right to participate or interest, whether enforceable or not and whether actual, prospective or contingent in any time-sharing scheme is also within the meaning of interest under s 84(c) — limb (c). Section 84(1) defines 'time-sharing scheme' to mean 'a scheme, undertaking or enterprise:

(a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise, whether in Malaysia or elsewhere is to operate, property to which the scheme, undertaking or enterprise relates; and

(b) that it to operate for a period of not less than three years.

[87] Philip Koh Tong Nge, in his article *'The Legality of Time-Sharing Schemes'* [1988] 3 MLJ (c) describes 'time-sharing' as follows:

> Time-sharing is the name used to describe a variety of arrangements whereby the right to occupy a property is divided among a number of persons by reference to certain periods of time. During each period of time, each of those persons obtain the right to occupy and use that property or an identifiable part of that property on a recurring basis.
>
> (See also Kinselle *'Real Estate Transactions as 'Prescribed Interests' under the National Companies Legislations'* (1984) 12 ABLR.)

[88] As opposed to the common understanding of 'time-sharing scheme', the plaintiffs' business is to develop and granting licence to use burial plots as well as to develop, construct and permit the purchasers to use the urn compartments. There is no element of sharing the property with other person by reference to different period of time. In addition, the essential element in the definition of 'time-sharing scheme' is to use the property 'for two or more periods'. There must be a 'period of time' stipulated in the transaction in order to make it falls within the meaning of limb (c).

[89] In our present case, the Standard Agreement does not stipulate a period of time in which the purchasers are to use the burial plots or urn compartments. There is no time limit for the purchasers to use the burial plots or urn compartments. Hence, the right of the purchasers to use the burial plots or urn compartments is not confined to 'a period of time' as defined in the definition of 'time-sharing scheme'. In short, the plaintiffs' business as offered through the Standard Agreements is not a 'time-sharing scheme' and thus not an interest under limb (c) of s 84.

LIMB F (D) — SECTION 84(D)

[90] The material parts of the meaning of interest in s 84(d) — limb (d) — are 'any right to participate or interest in any investment contract'.

[91] 'Investment contract is defined in s 84(1) as:

> any contract, scheme or arrangement which in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property which under or in accordance with the terms of investment will, or may at the option of the investor, be used or employed in common with any other

A interest in or right in respect of property acquire in or under like circumstances and includes any contract, scheme or arrangement which in substance and irrespective of the form thereof entitles the investor to a right to use or enjoy any sport, recreational, holiday or other related facilities for a consideration and for a duration of not less than 12 months whether or not on a recurring basis.

B **[92]** The definition suggested in s 84(i)(d) of an 'investment contract' would embrace any contract which in substance (albeit not in a formal contract) involves an investment of money under circumstances that the investor acquire a right of participation in interest. It is not precisely defined and overlaps with the earlier two categories in limb (a) and limb (b).

C **[93]** In *Munna Beach Apartments Pty Ltd v Kennedy & Ors* [1983] 1 ACLC 721 Mc Pherson J held that in order to satisfy the description of an 'investment contract' three requirements must be satisfied, namely:

(i) it involves the investment of money;

D (ii) the investor must acquire an interest in or a right in respect of property;

(iii) such interest or right will or may at the option of the investor be used or employed in common with any other interest or right in respect of the property acquired in like circumstances E (see also dictum of Nicholson J in *Butterworth v Lezemo Pty Ltd.*)

MEANING OF 'INVESTMENT'

[94] In respect of the first element, namely the requirement of 'investment F of money', Mc Pherson J in *Munna Beach* held:

whether the contract is one which involves the 'investment of money'. In this connection, I was referred to remarks of Jenkin J in *Re Power, Public Trustee* [1947] 1 Ch D 572 at p 575 where his Lordship accepted the existence of a distinction 'between purchasing freehold property for the sake of the income one is going to G get from it and purchasing freehold property for the sake of occupying it or permitting somebody else to occupy it. In the former case, the purchase is, in common parlance, and I think also in legal parlance, accurately described as an investment. In the latter case, it is not necessarily an investment, for it is a purchase for some other purpose than the receipt of income.

H **[95]** Further, at p 726, McPherson J referred to Professor L Loss's work:

the line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning of a profit as a result of the general increase in values concurrent with the I development of the neighbourhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.

[96] A distinction between 'investment' and purchasing a property for occupation is drawn by Mc Pherson J in that case.

[97] McPherson J. further held that:

> What is required by the definition is that there be a contract (or a scheme of arrangement) which involves an investment of money. It is not to the point that there be an individual who by reason of his making a contract becomes involved in an investment of money. The contract obliges the purchaser to make a payment, but the word used in the definition is not 'payment' but 'investment'. The widest popular meaning of 'investment' is the 'laying out of money in the purchase of some species of property usually of a permanent character'. This definition has sometimes found judicial favour: see *Taxes Commissioner v Australian Mutual Provident Society* (1902) 22 NZLR 445 at 450. But even this meaning, and more particularly the context in which the word is used in the definition in s 76(1), implies that some form of return, whether of the money itself or by way of income or profit or otherwise is expected or is in contemplation. Otherwise the money is not ordinarily described as 'laid out' or invested but simply as 'paid'. In my opinion, the contract of sale in the present case did not and does not contemplate any return to the purchasers of their money, and so is not one 'which involves the investment of money'.

[98] McPherson J stressed in this case that in order to constitute an 'investment', there must be some form of return which is expected or is in contemplation.

[99] In *Attorney-General for New South Wales v Australian Fixed Trusts Ltd & Anor* [1974] 1 NSWLR 110 at p 118, it was held that:

> ... in connection with the definition of 'investment contract', the relevant community of interest between the individual members is to be found in the enjoyment, each for himself, of his proportionate share of the investment of all of the parcels of moneys contributed by all the members, and, in particular, of the reinvestment of the income accruing upon the aggregated investments.

[100] In this regards, it is worth nothing the decision of Lawrence J in *Wragg v Palmer* [1919] 2 Ch D 58 at p 64 to the effect that:

> without attempting to give an exhaustive definition of the words 'invest' and 'investment' I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield': whilst the noun 'investment' when used in such a clause may safely be said to include as one of its meanings 'the property in the purchase of which the money has been so applied' no doubt in many cases the context in which the word 'investments' occurs requires that this word should be confined to investments consisting of stocks shares and securities, but where the word 'investments' is use without any such context, or where as in this case, the instrument in which it occurs expressly provides that the word is not to have any such restricted meaning, I think that it includes real restate purchased as an investment.

[101] Clearly, in order to constitute an investment contract, there must be element of 'profit' that the investor could enjoy, or at least in contemplation, when he entered into the transaction in question. In our case, there is no provision in the Standard Agreements to indicate that the Purchasers will receive profit or rent or any form of return.

[102] Further, the Standard Agreements merely give raise to a right to use the urn compartments and 'occupy' the burial plots by way of interment.

[103] Hence, it cannot be said that the Standard Agreements are the 'investment contract' the meaning of limb (d) as they lack the essential element of contemplation of monetary return.

MEANING OF 'COMMON WITH ANY OTHER INTEREST'

[104] In commenting whether the investor's right to use and to go upon the physical land amounts to 'right common with any other interest', the learned judge in *Munna Beach* held:

> strictly speaking, this is not so much a 'right' as a liberty which is an incident of the tenant's possession (itself a legal concept) with other co-owners...

[105] The learned judge further held at p 724 that:

> it is of course true that two or more of the tenants in common might elect or even agree to go upon the land simultaneously; but if they then proceeded to do so, itdoes not seem to me that they would be using their respective rights 'in common'. On the contrary, each of them would then be severely exercising his individual right, even though he might be doing so contemporaneously with and even by pre-arrangement with the other or others. To express it in another way, it is not enough for the purposes of the definition that a proprietor, who holds a right in common with others, should exercise that right. In order to attract the definition, the right must be exercised 'in common with' others, and that is not done simply by exercising the common right contemporaneously, or in pursuit of a pre-concert with others.

[106] Admittedly, there are clauses in the Standard Agreements which mention about accessing the other areas in common with other licensees (see cl 5) and purchasers of the burial plot (cl 8).

(a) Clause 5 of the Standard Agreement relating to urns compartment provides:

> the purchaser and his invitees shall have free and unhindered access to the compartment and the car park area and other areas designated for worship in common with other licencees and all persons having the same or similar fights;

(b) Clause 8 of the Standard Agreements relating to burial provides:

> the plots is sold together with the right to the purchaser in common with the vendor and the purchasers of all other plots to use the roads, common areas and other facilities and amenities appertenant to the enjoyment of the plot.

[107] Clauses 5 and 8 of the respective Standard Agreement provide for individual right or personal right to the purchasers to use other facilities. The words 'common with others' are only used in the context of recognising other purchaser's similar right to access and use the other facilities.

[108] Hence, when exercising the purchasers' right to use the facilities, the purchasers are exercising personal or individual right, as oppose to a 'right in common'. As observed by McPherson J the exercising of individual rights to access and use other facilities (as in the present case) is not within the definition of the words 'in common with other interest.

[109] The words 'employed in common with' are followed with 'any other interest in or right in respect of property acquired'. Therefore the 'common interest' in limb (d) must be that of the 'property acquired', not the person having an interest of the 'property acquired'. In other words, the words 'common interest' refer to the multiple interest that the purchasers acquired in the property, not the 'common interest' shared with other purchasers of the property. Hence, cll 5 and 8 of the Standard Agreements do not afford the meaning of 'common interest' within the definition of limb (d). Thus the plaintiffs' business cannot be said to fall within the definition of interest under limb (d) of s 84.

REFERENCE TO OTHER PROVISIONS IN PART IV DIVISION 5

[110] Besides applying the strict examination on the wording of s 84 and try to fit the words to the plaintiffs' business, there is another approach to determine whether the plaintiffs' business is within the contemplation of 'interest' in s 84. This approach is by way examining other related provisions in Division V Part IV and consider if they are suitable and applicable to the plaintiffs' business.

[111] This approach was considered in *Butterworth v Lezemo Pty Ltd* at p 747 where Nicholson J observed:

> I should comment that it seems unlikely that the legislature ever contemplated that either s 81 of the Companies Act or s 32 of the Securities Industry Act would strike at transactions such as the one presently under consideration. I think that this becomes apparent in relation to the Companies Act when one examines the remaining sections of Div 5. Section 82 requires the issue of a statement in writing which is deemed for all purposes to be a prospectus, and incorporates all of the provisions of the Companies Act and the rules of law relating to prospectuses. Section 83 prescribes the issue or offer to the public for subscription or purchase et cetera of any interest unless there is in force in relation to the interest a deed that is an approved deed. Section 84 requires the management company to keep a register of the holders of interests under the deed. Section 85 requires the lodgment with the Commissioner within two months after the end of each financial year applicable to the deed of a return in the prescribed form. Non of these provisions suggested a transaction of the type in question was contemplated as an interest.

[112] Assuming for a moment that the plaintiffs' business requires an approved deed to make it legal in offering to public, the plaintiffs must comply with the requirements of the approved deed under Division 5.

[113] Section 85 of the Act requires that a trustee or representative must be appointed for the purpose of the approved deed:

(a) The trustee or representative is appointed to secure the interest of the interest holders (see s 88(1)(c)(i)). It is not practical in the case of plaintiffs' business as the purchasers were merely licensee to use the urns compartments and burial plot.

(b) The trustee or representative must keep proper book of account relating to the interest (see s 88(1)(c)(ii)). In the plaintiffs' business, there is no current account that can be kept by the 'trustee' in respect of the 'interest' of the purchasers. There is only a payment of the purchase price of the purported 'interest'.

(c) The trustee or representative must have he account audited at the end of each financial year (see s 88(1)(c)(iii)) and must send the statement of account together with report of the auditor to the interest holders (see s 88(1)(c)(iv)). In the plaintiffs' business, as there is no current account, it is unnecessary to have the account audited and sent to the interest holders.

[114] The plaintiffs are to covenant that they will purchase that interest from the holder at their request (see s 88(1(b)(iii)). In the Standard Agreements, there are only rights to use the facilities provided by the plaintiffs. There is nothing for the plaintiffs to purchase, as the plaintiffs are only licensor.

[115] The plaintiffs are to covenant that no money available for investment under the deed will be invested in or lent to the plaintiffs (see section 88(1)(d)). The plaintiffs collect the 'purchase price' in consideration of granting license for the purchasers to use the urns compartments and the burial plots. The 'purchase price' belongs to plaintiffs in any event. There is no question of investing or lending the purchase price to the plaintiffs.

[116] The plaintiffs are to summon a meeting, when requested by the holder of interest, to lay the audited account of the trustee or representative and to give direction to the trustee or representative (see s 88(1)(h)). As stated above, this is impractical because there is no current account fit to be taken.

[117] The plaintiffs are to issue a statement setting out the matters or reports specified in Seventh Schedule (see s 90(2)(a)). It is noted that the provisions in Seventh Schedule are relating to business investments where the interest holders will receive benefits or gains from the company. In this case, there is no benefit or gains whatsoever payable to the purchasers. Hence, the plaintiffs are unable to comply with the Seventh Schedule.

[118] The plaintiffs are to lodge with the defendant a summary of sales and purchase and investment in land or marketable securities that affects the

interest of the holders of interest, and a list of all parcels of land and marketable securities and other investments and their valuation (see s 93(1)(b)). As the plaintiffs are mere licensors, it cannot be contemplated that the plaintiffs are to report on their sales and purchases or investment. In any event, the plaintiffs' other investment cannot be attached to the purported 'interest'.

[119] The holders of interest may resolve to wind up the undertaking, scheme or enterprise of the plaintiffs' business (see s 95). It cannot be the intention of the Parliament in this case that the licensee it entitled to resolve to wind up the business of the plaintiffs.

[120] Having analysed the impracticability of complying with the various provisions regarding the 'approved deed', the court is satisfied that the plaintiffs' business cannot be the contemplated 'interest' within s 84.

[121] It is unlikely that the legislature ever contemplated that s 84 of the Companies Act 1965 would strike at transactions such as the one presently under consideration.

PUBLIC POLICY

[122] In their submissions, the defendant raised the issue of public policy. The defendant argued that the Standard Agreements are signed between the Purchasers and the second plaintiff while the services are provided by the other subsidiaries, depending on the locality of the purchasers. The defendant submitted that the plaintiffs would have the benefit of separate legal entities in the event any dispute arises with the purchasers. The defendant further submitted that if such an event occurs, without having an approved trust deed and trustees in place, as envisaged under Part IV Division 5 of the Companies Act 1965, coupled with the sanctity of the principle of privity of contract, there will be little, if any, recourse available to the purchasers against the plaintiffs.

[123] The defendant further argued that in the present case, the purchasers are paying in full to the plaintiffs, for services rendered in the future. This, according to the defendant, strengthen the Defendant's contention that full and proper protection must be given to the purchasers. The defendants also submitted with the requirements under Part IV Division 5 of the Companies Act 1965 being imposed on the plaintiffs, it would result in better monitoring and supervision of the whole scheme by the investing public and the regulators.

[124] The court is of the view that all the relevant requirements under Part IV Division 5 of the Companies Act 1965 only apply to issuance of 'interest' as defined in s 84. Whatever intention or justification the defendant (as regulator of the Companies Act 1965) may have in supervising and regulating the plaintiffs' business, the said plaintiffs' business must in the first place comes within the definition of 'interest' as defined under s 84. The defendant may say that the plaintiffs' business need some form of supervision or regulation by the defendant or other relevant authorities, but such supervision or regulator

through the requirements under Part IV Division 5, cannot be imposed on the plaintiffs unless the plaintiffs business comes within the definition of 'interest'. We have discussed at great length above that the plaintiffs business does not come within the definition of 'interest' under s 84 of the Companies Act 1965. Therefore the question of the plaintiffs having to comply with all the relevant requirements under Part IV Division 5 does not arise. If the authorities feel that this type of business (as provided by the plaintiffs) need to be supervised or regulated, the only recourse is to have the provisions relating to the definition of 'interest' in the Companies Act 1965 be amended accordingly. (The same provisions were amended once to include the business of 'time-sharing as an 'interest' in s 84(1)(c) — limb (c).

[125] The legal relationship between the plaintiffs and the purchasers is based on contract through the Standard Agreements. In the event of any disputes between the plaintiffs and the Purchasers, the Purchasers may seek their redress in court under contract or any other related cause of actions.

[126] On the issue of separate legal entity (as raised by the defendant) the court has the power, in appropriate case to lift the corporate veil or to add parties to any proceedings taken by the purchasers, even though the parties are not signatories to the original Standard Agreements.

[127] The fact that the purchasers are paying in full to the plaintiffs for services to be rendered in the future, the court is of the view that it is insufficient to bring the plaintiffs business within the definition of 'interest' in s 84. A business can only be said to be an 'interest' if it fulfills all the relevant elements of the definition in s 84, but not otherwise. There are a lot of transactions nowadays (especially in insurance, securities, and financial industries) involving payment of money in full for services to be rendered in future. Obviously all those transactions cannot be said to fall within the definition of 'interest' and subject to the requirements of Part IV Division 5 of the Companies Act 1965, just on that ground alone.

[128] In the present case, as has been considered earlier, it is impossible for the plaintiffs to perform and comply with all the obligations and requirements under Part IV Division 5. Those requirements are not meant for a business like in the present case. The court will not impose obligations that are not capable of performance and not intended for that type of business or scheme. As such, there is no basis to argue (as what the defendant did) that the rights of the purchasers can be adequately protected by subjecting the plaintiffs to the obligations under Part IV Division 5.

CONCLUSION

[129] The plaintiffs' business is not an 'interest' within the meaning of limb (a) because there is no profit available for the purchasers to participate. The mere right to use the facilities developed by the plaintiffs is not participation in the assets of the plaintiffs.

[130] Limb (b) is not available because there is no common enterprise whereby the plaintiffs and purchasers are both involved to gain benefit. In this respect, the purchasers do not contemplate any profit because the Standard Agreements do no have the term to guarantee profit or rent. Further, there is no subsequent transaction to be performed by the Purchasers besides the purchase of the right to use the urn compartments as well as the burial plots as stipulated in the Standard Agreements.

[131] Limb (c) is also not applicable because the plaintiffs' business is not understood to be the time-sharing scheme. There is no 'two or more period' in which the purchasers can occupy the property of the plaintiffs. The purchasers may use the urns compartment and burial plots allotted to them perpetually.

[132] The Standard Agreements are not investment contract because they do not contemplate pecuniary return to the Purchasers.

[133] On the above findings, the court is making the following declarations by the plaintiffs as prayed namely:

(a) that the plaintiffs' business in respect of the urn compartments and the burial plots does not fall within the meaning of 'interest' in s 84 of the Companies Act 1965;

(b) that an approved deed under Part IV Division 5 of the Act is not required for the plaintiffs to offer the services to the public;

(c) that by offering the services to the public without an approved deed under Part IV Division 5 of the Act, the plaintiffs do not contravene s 91 of the Act;

(d) that each party bears their own costs.

Declarations granted.

Reported by Izzaty Izzuddin